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In the Supreme Court of the United States

OCTOBER TERM 1966

No. ~~1324~~ 79

TV PIX, INC. and WELLS TV, INC.,
Appellants,

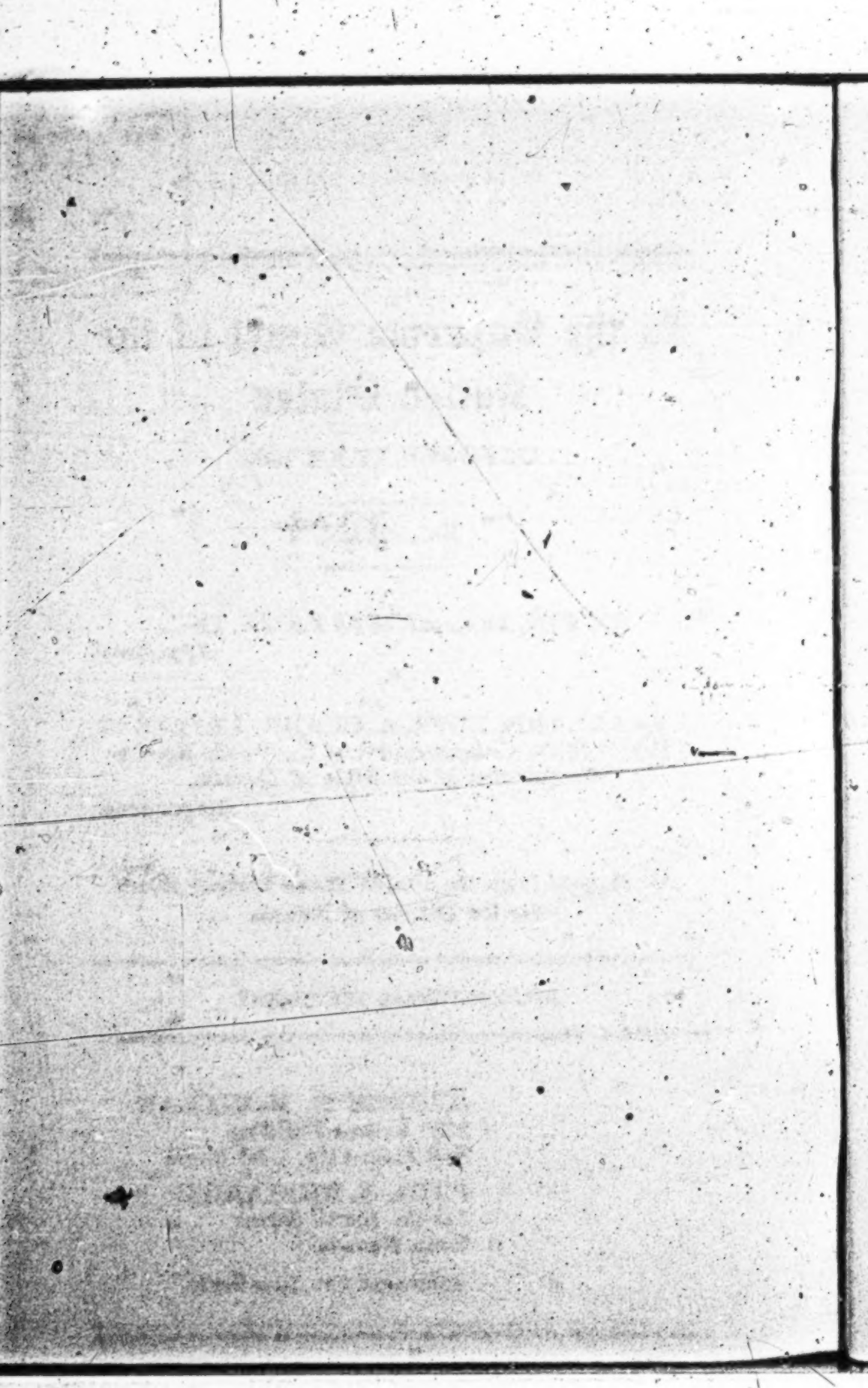
v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

JURISDICTIONAL STATEMENT

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101
PAUL A. RICHARDS
240 So. Sierra Street
Reno, Nevada
Attorneys for Appellants



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In the Supreme Court of the United States

OCTOBER TERM 1966

No.....

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Appellants,

v.

J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Appellees.

On Appeal from the United States District Court for the District of Nevada

JURISDICTIONAL STATEMENT

OPINION BELOW

The written opinion of the District Court is attached to the Jurisdictional Statement as Appendix "A". It was not reported.

STATEMENT OF JURISDICTION

These actions were filed to enjoin the defendants, Public Service Commissioners of the State of Nevada,

from making effective certain rulings and determinations made under color of the state statute on the grounds that such rulings and the state statute as interpreted by defendants violated the Interstate Commerce Clause, the Supremacy Clause, and the Fourteenth Amendment to the Constitution of the United States. A three-judge court dismissed plaintiffs' complaints on December 16, 1966 after notice and hearing, thereby denying both interlocutory and permanent injunctions. Motions for a new trial, to amend the judgment, and a memorandum in support of said motions were filed by the plaintiffs on December 28, 1966; an Order denying plaintiffs' said motions was dated and filed January 19, 1967. The Appellants filed a Notice of Appeal to this court on February 6, 1967. The jurisdiction of this court rests upon 28 USCA Section 1253.

Among the cases believed to sustain jurisdiction are: *Florida Lime and Avocado v. Jacobsen,* (1960) 362 U.S. 73, 4 L.Ed(2d) 568, 80 S. Ct. 568; *England v. Louisiana Medical Examiners,* (1964) 375 U.S. 411, 11 L.Ed(2d) 440, 84 S. Ct. 461; *Baggett v. Bullitt,* (1964) 377 U.S. 360, 12 L.Ed. (2d) 377, 84 S. Ct. 1316; *Frasier v. Board of Trustees of University of No. Carolina,* (1955, D.C. N.C.), 134 F. Supp. 589; aff. 350 U.S. 979, 100 L.Ed. 848, 76 S. Ct. 467. Other cases are cited at pp. 8-11, *infra.*

The state statute and rulings thereunder believed to raise the constitutional questions involved in this litigation are attached collectively as Appendix "B".

QUESTIONS PRESENTED

1. Whether the court erred in failing to rule upon the constitutional questions presented upon their merits.

(a) Whether the doctrine of federal abstention is applicable where there is a justiciable controversy between the parties involving a constitutional question and no non-federal issue is presented.

(b) Whether the doctrine of federal abstention is applicable where an issue unresolved by the state court but decided by a state administrative agency having original authority to decide such question involves solely the application of federal law.

(c) Whether, if federal abstention is applicable, the court erred in dismissing the cases rather than simply staying proceedings pending a state court ruling.

2. Whether the state of Nevada can regulate community antenna systems as public utilities consistently with the Commerce Clause of the United States Constitution.

3. Whether the state of Nevada can regulate community antenna systems as public utilities consistently with the Supremacy Clause of the United States Constitution.

4. Whether state public utility-type regulation of community antenna systems would violate the Fourteenth Amendment of the United States Constitution inasmuch as the state is powerless to provide correlative protection.

STATEMENT OF THE CASE

Appellants own and operate community antenna systems in Wells, Elko, Carson City and Tahoe, Nevada. Essentially their business activities consist of picking up signals from out-of-state television stations, causing them to be transmitted by microwave common carrier from a pick-up point to a point of distribution, amplifying such signals and transmitting them to subscribers through distribution facilities located in the aforesaid communities. The Federal Communications Commisson has ruled, upon numerous occasions, that community antenna systems constitute interstate commerce; that they are a link in the chain of interstate communications. Such rulings have been affirmed by the Circuit Court of Appeals for the District of Columbia. (See infra pp. 11, 12). Notwithstanding such rulings, the state of Nevada, through the respondents (defendants below), who are members of the Public Service Commission of said state, made a series of unequivocal rulings to the effect that the plaintiffs' community antenna systems are not engaged in interstate communications but rather are intrastate in nature, and that the defendants have the authority to regulate plaintiffs' business activities as public utilities under the Nevada statute. TV Pix, Inc., and Wells TV, Inc., filed separate actions asserting that the state had no constitutional authority to regulate such systems on the grounds that (1) state regulation of community antenna systems as public utilities would conflict with the Commerce Clause of the Unied States Constitution; (2) state regulation of community antenna systems as public utilities would conflict with

the Supremacy Clause of the United States Constitution and the Communications Act of 1934; and (3) state public utility-type regulation of community antenna systems would violate the Fourteenth Amendment of the United States Constitution inasmuch as the state was powerless to provide any correlative protection as an incident of such regulation.

Upon plaintiffs' motions, a three-judge court was convened to determine the questions involved and the cases were consolidated for hearing. At a hearing on September 30, 1966, the issues were submitted upon a written Stipulation of Fact and the evidence presented by the parties. The evidence received consisted primarily of a description of the operations of plaintiffs' systems in the communities served. Plaintiffs pick up and deliver to their subscribers the television signals broadcast from out-of-state stations carrying network programs and nationally distributed features and syndicaetd films. The evidence was undisputed that the defendants had entered orders and issued general notices to all community antenna systems in the state to the effect that the defendants were acting pursuant to the authority contained in the state statute and that the state Public Service Commission asserted jurisdiction to regulate the plaintiffs' community antenna systems as public utilities. Plaintiffs were required by such orders to file applications for certificates of public convenience and necessity. Defendants issued an order to each of the plaintiffs requiring it to show cause why it should not cease and desist transacting business as a community antenna system in each of the cities served until such

certificate was issued by the defendants. The defendants' orders constituted, under state law, a determination by defendants that the state of Nevada had jurisdiction to regulate as public utilities the plaintiffs' systems. The plaintiffs' complaints assert that constitutional and federal questions were presented by such orders.

In their answers, the defendants admit that they have interpreted and do interpret the Nevada statute as authorizing them to regulate community antenna systems in the State of Nevada as public utilities. They admit that they have interpreted and do interpret the activities of the plaintiffs as not constituting interstate commerce. They admitted that they had opened formal investigations with a view to regulating plaintiffs' systems under color of the state statute. (cf. para. 9 of Plaintiff's Complaint with para. 10 of defendants' Answer.)

Following a hearing, the three-judge court convened pursuant to 28 USCA Section 2281, held that although the jurisdiction of the District Court may have been properly invoked, the court in this case should apply the doctrine of federal abstention upon the ground that there were unresolved state issues. Emphasizing that the state statute provided that interstate commerce was excluded from the definition of public utilities subject to defendants' jurisdiction, the court stated that "if the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached." The court dismissed the complaints.

THE QUESTIONS ARE SUBSTANTIAL

A. A substantial question exists with respect to the application of the abstention doctrine.

The District Court applied the federal abstention doctrine on the ground that "there are . . . many state questions to be resolved." The District Court did not merely defer a ruling until the plaintiffs had obtained a state determination on the alleged state questions; it dismissed the actions. The record shows without any peradventure of doubt that the defendants had determined that community antenna systems in general and those operated by the plaintiffs in particular, in Wells, Elko, Carson City and Tahoe, were subject to the regulation of the state of Nevada as public utilities. The Nevada statute provides that it "do[es] not apply to interstate commerce." NRS Section 704.020 1(d). The respondents ruled, as Public Service Commissioners of the state of Nevada, that community antenna systems constituted intrastate commerce; that the appellants, in other words, were not engaged in interstate commerce, and that the state statute, therefore, conferred jurisdiction. The rationale of the District Court was: "If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached." The difficulty with this position is the only interpretation by the state courts upon "interstate commerce" which is possible necessarily involves the application of federal law. The proposition has long been settled that the determination of whether specific conduct constitutes interstate commerce must be decided under the federal

rule. *Gibbons v. Ogden* (1824) 9 Wheaton 1, 6 L Ed. 23.

In *England v. Louisiana Medical Examiners*, (1964) 375 U.S. 411, 11 L.Ed(2d) 440, 84 S. Ct. 461, this court interpreted *Government and Civic Employees Organizing Co. v. Windsor*, (1957) 353 U.S. 364, 1 L.Ed(2d) 894, 77 S. Ct. 838, to the effect that federal claims need not be litigated in state courts. *England* holds that while the abstention principle authorizes a District Court to refer a state question to the state judicial system for adjudication, the plaintiff may reserve a federal question of adjudication through the federal system by an express statement into the record in the state proceeding. If, in a case involving both federal and state questions, the federal issues may be reserved, or if, as this court inferred in *NAACP v. Button*, (1963) 371 U.S. 415, 9 L.Ed(2d) 405, 83 S. Ct. 328, a party has the right to return to the District Court after obtaining an authoritative state court construction upon state law, it follows that abstention is inappropriate where no question other than federal ones require adjudication.

The court has held abstention to be inappropriate where there is no uncertainty under state law, (*Baggett v. Bullitt* (1964) 377 U.S. 360, 12 L.Ed(2d) 377, 84 S. Ct. 1316) and where a state ruling on local law could not decide the federal question. *Public Utilities Commission v. United Fuel Gas Co.*, (1942) 317 U.S. 456, 87 L.Ed. 396, 63 S. Ct. 369. Where no issue remained to be resolved by the state court ". . . no occasion is presented for abstention and the litigation should be

disposed of as expeditiously as is consistent with proper judicial administration." *Turner v. Memphis* (1962) 369 U.S. 350, 7 L.Ed(2d) 762, 82 S. Ct. 805.

The fact that the state statute excluded interstate commerce from the area over which the state agency was given jurisdiction does not mean that the determination of the conduct which constitutes interstate commerce becomes a state question rather than a federal one. The language of the statute excluding interstate commerce is superfluous. As a matter of constitutional law, state power insofar as the regulation of interstate commerce is concerned, is excluded. *Gibbons v. Ogden, supra.*

Assertion of jurisdiction by a state agency in controvention of the United States Constitution necessarily is illegal as a matter of federal law. In the instant case, the unlawful assertion of jurisdiction by the state agency gives rise to the constitutional question and gives plaintiff a right to a determination of the constitutional issues under 28 USCA 2281. It has been held repeatedly that 28 USCA 2281 "requires a three-judge court not only when it is sought to restrain the enforcement of an unconstitutional statute but also the enforcement of an unconstitutional order of an administrative board or commission clothed with authority and acting under the laws of the state". *Frasier v. Board of Trustees,* (D.C. M.D. N.C. 1955) 134 F. Supp. 589, citing numerous cases; affirmed 350 U.S. 979, 100 L.Ed. 848, 76 S. Ct. 467.

This is not a case like *PSC of Utah v. Wycoff Co.,* (1952) 344 U.S. 237, 97 L.Ed. 291, 73 S. Ct. 286, where the state agency had made no order raising a

constitutional question, or *Burford v. Sun Oil Co.*, (1942) 319 U.S. 315, 87 L.Ed. 1424, 63 S. Ct. 1098, where a state agency with admitted jurisdiction made an order which was subject to review in the state courts against an admittedly intrastate utility. In the instant case, the defendants' orders at the same time raised the constitutional issues presented by the Appellants for adjudication on the merits and constituted a legal conclusion which contradicted the decisions of the FCC and at least one circuit court of appeals on a federal question. (See infra pp. 11, 12).

The plaintiffs are placed in an untenable position by the ruling. If the District Court's decision is not appealed, since the ruling dismissed the action, it is possible that the judgment may be res adjudicata, even though there was no adjudication on the merits. If, on the other hand, the plaintiffs file an action in the state court and the eventual ruling is adverse to plaintiffs' positon, notwithstanding the clear federal rule adjudicating community antenna systems to constitute interstate commerce, plaintiffs' right to review by this court would be extremely tenuous. A petition for certiorari under 28 USCA 1257 cannot be equated with the summary adjudication of federal and constitutional questions under 28 USCA 2281 and appealed under 28 USCA 1253. This court held in *England, supra*, that review by certiorari " . . . is an inadequate substitute for the initial district court determination . . . to which the [plaintiffs are] entitled in the federal courts. This is true as to issues of law. It is especially true as to issues of fact," at page 416 U.S. Reporter, 446 L.Ed.

Appellants suggest the application of the teaching of *Florida Lime and Avocado v. Jacobsen*, (1960) 362 U.S. 73, 4 L.Ed(2d) 568, 80 S. Ct. 568.

> " . . . There is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy, which appellants are entitled to have determined on the merits. In these circumstances, the fact that appellants did not contest the validity of [the state statute] nor seek abatement of appellee's [administrative ruling] which, because of the time period necessarily involved, would have resulted in [irreparable damage] does not constitute an impediment to their right to seek an injunction in the federal court against [the state statute] on the ground that it violates the Constitution of the United States and the [federal statute, in the instant case the Communications Act of 1934]."

B. Substantial constitutional questions exist with respect to the powers of a state to regulate community antenna systems as public utilities.

THE INTERSTATE COMMERCE ISSUE

The FCC ruled repeatedly that:

> " . . . CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which is now well established . . . as interstate communication.' *Capital City Telephone Co.*, 3 FCC 189, 198 (citing *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266). The law is clear that the mere location of communication facilities wholly within one state does

not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one state. *California Interstate Telephone Co. v. FCC*, 328 F.2d 556 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (C.A. 6); cert. den. 371 U.S. 820; *Pacific Telatronics, Inc.* FCC 64-1180, 4 R.R. (2d) 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, *Clarksburg Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A. D.C.), and hence constitute 'interstate communication by wire' to which the provisions of the Act are applicable (Section 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311." (Emphasis by the Commission). (FCC Second Report and Order, Docket Nos. 14895, 15233 & 15971, 31 F.R. 6340).

The District of Columbia Circuit approved the Commission's rule in *Idaho Microwave, Inc. v. FCC*, (1965, CCA, D.C.) 352 F.(2d) 729. Faced with an argument that microwave service to a CATV operator in Burley, Idaho, did not constitute interstate commerce because all of the facilities of the carrier and the CATV were within the state of Idaho, the court said:

"The Burley facility (CATV system) is used as a link in the continuous transmission of television signals from Salt Lake City to Burley, Idaho; there is no interruption in the flow of the signal as it is practically instantaneous. Thus, though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate

communications service when it takes part in the transmission of signals from Utah to Idaho."

In other cases involving interstate communication, this court has held that states cannot impose public utility-type controls without express congressional authorization. *Buck v. Kuykendall* (1925) 267 U.S. 307, 69 L.Ed. 623, 45 S. Ct. 324, 38 A.L.R. 286; *Bush & Sons Co. v. Maloy*, (1925) 267 U.S. 317, 69 L.Ed. 627, 45 S. Ct. 323; cf. *Fisher's Blend Station v. Tax Commission*, (1936) 297 U.S. 650, 80 L.Ed. 956.

THE SUPREMACY ISSUE

The Commission has also held that CATV systems are not common carriers within the meaning of Title II of the Communications Act. (Second Report and Order, supra, para. 15 and authorities cited). CATV systems are, however, subject to the jurisdiction of the Commission. (Second Report and Order, supra, para. 19).

The policy of the Communications Act is that all communications facilities subject to the Commission's jurisdiction except common carriers are left in the field of free competition. The federal policy is that such facilities are not to be regulated as public utilities. *United States v. Radio Corporation of America*, (1959) 358 U.S. 334, 3 L.Ed(2d) 354, 79 S. Ct. 45; *Pulitzer Publishing Co. v. F.C.C.*, (1957 CCA D.C.) 94 F.(2d) 249. A three-judge court explicitly held in *National Broadcasting Co. v. Board of Public Utility Commissioners*, (1938 D.C. N.J.) 25 F. Supp. 781, that a state could not regulate the operation of a broad-

cast transmitter as a public utility. State regulation of community antenna systems would substantially interfere with federal policy as provided in the Communications Act of 1934.

The existing policies made effective by the Federal Communications Act concerning CATV operation include operating restrictions in a number of areas, including the areas of non-duplication of programs, carriage and non-carriage of the signals of originating and local stations, and non-operation of community antenna systems in certain large metropolitan areas in the country. (Second Report and Order, supra, para. 51-65; 39-41; 41-146). Public utility-type regulation by a state would necessarily and substantially interfere with and invade the area pre-empted by these policies and regulations.

THE FOURTEENTH AMENDMENT ISSUE

The competitors of community antenna systems are commercial television stations, VHF and UHF translators and boosters. These facilities are all licensed and regulated within permissible limits by the FCC under the federal act. The state of Nevada is powerless to protect CATV systems within its borders from this competition. It has been held that public utilities necessarily are entitled to reasonable protection from unlimited competition as a *quid pro quo* for the exercise of public control over their properties. *Brady Transfer and Storage Co. v. United States* (D.C. Ia. 1948) 80 F.Supp. 110, aff. 335 U.S. 875, 93 L.Ed. 418, 69 S. Ct. 239; *Chicago R. R. Co. v. Commerce Commis-*

sion, (1929) 336 Ill. 51, 167 NE 840; *Egyptian Transportation Systems, Inc. v. Louisville & N.R.R. Co. et al.,* (1926) 321 Ill. 580, 152 NE 510; *State ex rel Crown Coach Co. v. Public Service Commission,* (1944) 238 Mo. App. 287, 179 SW(2d) 123.

Appellants suggest, therefore, that the state regulation of CATV as public utilities contravene the Commerce Clause, the Supremacy Clause, and the Fourteenth Amendment to the Constitution of the United States. The question has never been decided by this court or by any federal or state court. Inasmuch as more than 1600 community antenna systems now operate in the United States, and particularly in view of the increased attention being given to state regulation by states throughout the country, a ruling on the substantive question would substantially aid the orderly integration of these facilities into the communications pattern. Adjudication of the constitutional issues is vital to the proper federal-state relationship in this dynamic communications area.

The substantial constitution questions involved justify and require complete presentation to this court.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE INJUNCTION.

Plaintiffs have a right to an adjudication of the federal question under 28 USCA Section 2281. The court admitted that it had jurisdiction. Abstention constituted an abuse of discretion since there were no non-federal issues. Appellants' arguments are summarized on pp. 7-11 of this Statement of Jurisdiction. Denial of

the right to adjudication of the federal issues under these circumstances constituted an abuse of discretion.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

RESPECTFULLY SUBMITTED this 27th day of March, 1967.

GEORGE M. McMILLAN
1020 Kearns Building
Salt Lake City, Utah 84101

PAUL A. RICHARDS
248 So. Sierra Street
Reno, Nevada

Attorneys for Appellants

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

TV PIX, INC.,
Plaintiff,
vs.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Defendants.
No. 1814

WELLS TV, INC., a corporation,
Plaintiff,
vs.
J. G. ALLARD, NOEL A. CLARK, LESLIE W. CARLSON, Commissioners of the Public Service Commission of the State of Nevada,
Defendants.
No. 1827

Before MERRILL, Circuit Judge, and FOLEY and THOMPSON, District Judges:

PER CURIAM:

Plaintiff in No. 1814 (TV PIX, INC.) is a corporation organized under the laws of the State of Nevada. It owns and operates community antenna systems in Elko, Carson City and Stateline, Nevada.

Plaintiff in No. 1827 (Wells TV, Inc.) is also a corporation organized under the Nevada statutes which owns and operates a community antenna system in Wells, Nevada.

The Complaint in No. 1814, filed on March 24, 1966, invoked jurisdiction of this Court under 28 U.S.C. 1331, 2281 and 2284. It alleges that the defendants, Commissioners of the Public Service Commission of the State of Nevada, have interpreted Chapter 704 of the Nevada Revised Statutes to authorize regulation of community antenna systems as public utilities. The plaintiff contends any such regulation would contravene the due process clause of the Fourteenth Amendment and the Commerce Clause of the Constitution and that the Federal Government has pre-empted the states in the regulation of such operations. The Complaint seeks a preliminary and final injunction prohibiting the defendants from investigating, taking jurisdiction, or imposing any regulation pursuant to Chapter 704 of the Nevada Revised Statutes.

On April 19, 1966, the Nevada Public Service Commission issued an order to TV Pix, Inc. to appear and show cause why its operation in Elko should not be included within the purview of N.R.S. 704.020 as a "public utility", thereby requiring a certificate of public convenience and necessity under N.R.S. 704.330 (1). Similar orders were directed to TV Pix, Inc. on April 20, 1966, concerning its operation in Carson City and Stateline. On the latter date, an order was also directed to Wells TV, Inc. to show cause why its operations should not be similarly regulated.

The Complaint in No. 1827 was filed on May 10, 1966, alleging the same grounds for relief as that in No. 1814. A temporary restraining order was then issued on May 10, 1966.

This three-judge court was impaneled, and on September 30, 1966, heard motions for a preliminary injunction and for dismissal.

Although the jurisdiction of a federal court may have been properly invoked, the Courts often abstain from its exercise. Perhaps to create order out of chaos, the commentators have classified the abstention cases into two broad categories. Cf. 1 Barron & Holtzoff, Wright, Ed., Section 64. On the one hand, we have the *Pullman* type cases wherein state action is being challenged in the federal court as contrary to the federal constitution, and there are unsettled questions of state law which may be dispositive of the case. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496. On the other hand, we have the *Burford* type cases wherein the federal court refrains from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs. *Burford v. Sun Oil Co.*, 319 U.S. 315. The present actions present problems in both areas of abstention.

In *Pullman*, the company sought to enjoin enforcement of an order of the Texas Commission. In addition to the federal constitutional issue raised, there was an unsettled question under state law of whether the Commission had the power to make its order. Although the district court had jurisdiction of the suit, the Supreme Court held it should have remanded the case to the

state court for a determination of the state issues. The rationale of *Pullman* is to avoid a premature determination of a federal constitutional issue which may not survive state litigation. So long as there is adequate state review to decide the state issue, the federal court should abstain. See *Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168; *Harrison v. N.A.A.C.P.*, 360 U.S. 167; *Green v. Phillips Petroleum*, 119 F. 2d 466.

Here, as in *Pullman*, "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, supra, at 500. The defendants are attempting to bring the plaintiffs within the language of N.R.S. 704.020 which defines a public utility as "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. *The provisions of this paragraph do not apply to interstate commerce.*" [Emphasis added.] N.R.S. §704.020 (d).

The plaintiffs attack the interpretation on federal constitutional grounds. There are, however, many state questions to be resolved. If the statutory exclusion of interstate commerce is given a broad interpretation by the state courts, the difficult questions of infringement of state action upon federal constitutional prohibitions may never be reached. *Bonanza Air Lines, Inc. v. Public Comm. of Nevada*, 1960, 186 F. Supp. 674.

There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of N.R.S. 704.020(d), they will then issue an order re-

quiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. N.R.S. 704.380(4). The plaintiffs may then bring an action in the state district court to have the order of the Commission vacated or set aside. N.R.S. 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada. N.R.S. 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audiocasting, Inc. v. State of Louisiana*, 143 F. Supp. 922.

Particularly persuasive is *Public Service Commission of Utah v. Wycoff, Inc.*, 344 U.S. 237. In that case, the respondent sued the Commission in the Federal District Court. The company sought (1) a declaratory judgment that its activities were in interstate commerce, and (2) an injunction against the Commission interfering with its activities. At the time of the suit, there was no decision of the Commission to interfere with the company's activities. The company merely

alleged a threat of such action. The Supreme Court ordered dismissal in the following language:

> "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41; Eccles v. Peoples Bank, 333 U.S. 426. See Colegrove v. Green, 328 U.S. 549. Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts.
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.
>
> "Declaratory proceedings in the federal courts against state officials must be decided with regard for implications of our federal system. *State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary*

> *right to take evidence and make findings of fact.* It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. Alabama State Federation of Labor v. McAdory, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." [Emphasis added.] *Wycoff*, supra, at 246, 247.

In the cause before this Court, there has been no decision by the defendants to regulate the plaintiffs. The only action of the Commission is an order to show cause why the plaintiffs should not be regulated, i.e., the Commission has simply ordered a hearing. To reach the federal question involved, we would have to assume that the State has chosen to regulate. In substance, the plaintiff is asking this Court to enjoin the State from making a final choice. We think that such meddling in the administrative affairs of the State of Nevada would be a clear violation of the *Burford* doctrine. There is sufficient state judicial review available from any order the Commission may make. Cf. N.R.S. 704.540, 704.580, supra.

The motions for preliminary injunction are denied and the actions are dismissed.

/s/ CHARLES M. MERRILL
CIRCUIT JUDGE

/s/ ROGER D. FOLEY
DISTRICT JUDGE

/s/ BRUCE R. THOMPSON
DISTRICT JUDGE

APPENDIX B

This appendix consists of excerpts from the Nevada Revised Statutes, a general order directed to all community antenna TV companies dated February 1, 1966; and an Order to Show Cause directed to TV Pix, dated April 19, 1966. Similar orders were directed to Wells TV, Inc., and to plaintiffs' systems in Carson City and Tahoe.

Nevada Revised Statute

708.150 · *General Duties of Commission.*

The commission shall supervise and regulate the operation and maintenance of public utilities, as named and defined in chapter 704 of NRS, in conformity with the provisions of chapter 704 of NRS.

704.020 *"Public Utility" defined.*

1. As used in this chapter, "public utility" shall mean and embrace:

. . .

(d) . . . any plant, property, or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce.

BEFORE THE PUBLIC SERVICE COMMISSION OF NEVADA

Case No. 1530

In the Matter of an Investigation on the Commission's own motion into the operations and practices of TV

PIX, INC., ELKO, NEVADA, which serves Community Antenna Television to the Elko area to determine whether or not they are an intrastate or interstate operation

At a general session of the Public Service Commission of Nevada, held at its offices in Carson City, Nevada, April 11, 1966

PRESENT: Chairman J. G. Allard
Commissoiner Noel A. Clark
Commissioner Leslie W. Carlson
Secretary William E. Mooney
Assistant Secretary Cora Austin

ORDER TO SHOW CAUSE

IT APPEARING That the Public Service Commission of Nevada is advised and by its own knowledge has reason to believe that TV PIX, INC., has operated and continues to maintain and operate a community antenna television service in and near the vicinity of Elko, County of Elko, Nevada,

IT FURTHER APPEARING That Nevada Revised Statue 704.020 1. (d) "Public Utility" defined reads: "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

IT FURTHER APPEARING That NRS 704.020 b. (b) reads: "The commission (Public Service Commission of Nevada) is hereby invested with full power of supervision, regulation and control of all such utilities subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipility, town or village, unless otherwise provided by law."

IT FURTHER APPEARING That NRS 704.330 1. reads: "Every public utility owning, controlling, operating or maintaining or having any contemplation of owning, controlling or operating any public utility shall, before beginning such operation or continuing operations or construction of any line, plant or system or any extension of a line, plant or system within this state, obtain from the commission (Public Service Commission of Nevada) a certificate that the present or future public convenience or necessity requires or will require such continued operation or commencement of operations or construction."

IT FURTHER APPEARING That said TV PIX, INC., has not made application for a certificate, and further states that it denies the jurisdiction of the Public Service Commission over its operations in community antenna television operations, and therefore does not intend to make such application therefor; and

IT FURTHER APPEARING That the Attorney General of Nevada in Opinion No. 128 states that such community antenna television operation comes within the purview of public utilities as defined in NRS 704.020; and

NOW, THEREFORE IT IS ORDERED by this Commission, pursuant to authority granted under NRS 704.330 4., and upon its own motion, that TV PIX, INC., by its duly authorized representatives, shall appear before the Commission:

Nye Building
201 South Fall Street
Conference Room No. 1
9:30 A.M.
Tuesday, May 10, 1966

and show cause, if any there be, why the Commission should not order it in pursuance of NRS 706.220 to cease and desist in operating and offering such service to the public in the manner of a public utility engaged in intrastate commerce within the State of Nevada as

hereinabove set out, until properly authorized by this Commission.

LESLIE W. CARLSON, Commissioner
BY THE COMMISSION,
/s/ Leslie W. Carlson

Attest:
/s/ William E. Mooney
WILLIAM E. MOONEY, Secretary
Dated: Carson City, Nevada
April 19, 1966

(SEAL)

PUBLIC SERVICE COMMISSION
STATE OF NEVADA

February 1, 1965

TO ALL COMMUNITY ANTENNA TV COMPANIES:

Please be advised that pursuant to N.R.S. 704.020, Paragraph 1(d):

> "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricty. The provisions of this paragraph do not apply to interstate commerce."

Subsequent to a long study by this Commission, on September 17, 1964 in a duly constituted meeting of the Public Service Commission of Nevada it was unanimously passed, that this Commission would take active jurisdiction of Community Antenna TV Companies on rates, facilities and services.

Further, that each supplies of said services in the State of Nevada make application to the Commission for a certificate of public convenience and necessity pursuant to N.R.S. 704.330.

Therefore, you are respectively requested to complete the enclosed forms and return them to this Commission within thirty (30) days from receipt of same.

Applications are to be completed according to all statutory provisions and approved Rules of Practice and Procedure of this Commission.

A separate application must be submitted for each area the company desires to serve.

Handbooks may be obtained by writing the Nevada Public Service Commission and requesting Bulletin No. 1 which covers 704, inclusively, for the sum of $1.50 or the Rules of Practice and Procedure before the Commission for $1.00.

Should you have any questions please feel free to call upon us.

Very truly yours,

PUBLIC SERVICE COMMISSION
OF NEVADA

LESLIE W. CARLSON, Commissioner

PUBLIC SERVICE COMMISSION
STATE OF NEVADA

December 9, 1965

George M. McMillan, Esq.
Attorney at Law
1020 Kearns Building
Salt Lake City 1, Utah

Re: CATV Stations - Wells, Elko, Carson City, and Tahoe

Gentlemen:

The Commission, for many months, has been studying its jurisdiction on community antenna facilities.

NRS 704.020 Public Utilities Defined, paragraph (d) states, "Any plant, property or facility furnishing facilities to the public for the transmission of intelligence via electricity. The provisions of this paragraph do not apply to interstate commerce."

The Attorney General's opinion dated April 22, 1964, Opinion No. 128, indicates that all intrastate community antenna operations are subject to the jurisdiction of the Public Service Commission of Nevada. Therefore, it becomes mandatory at this time that you fill in the enclosed applications, returning an original and three copies, with all exhibits, in conformance with NRS 704.330 and Rule No. 14.1 of the Commission's Rules of Practice and Procedure. Bulletins on NRS 704, inclusive, and Rules of Practice and Procedure are available in both the Carson City office and the Las Vegas office of the Public Service Commission. Therefore, we request the enclosed applications be completed, an original and three (3) copies, within thirty (30) days.

The office will ask the Attorney General to take whatever legal steps are necessary should any operating Community Antenna Company fail to file an application for a certificate of public convenience and necessity, as described in NRS 704.330, within thirty days from the receipt of this letter.

Very truly yours,

PUBLIC SERVICE COMMISSION
OF NEVADA

LESLIE W. CARLSON, Commissioner